-328 FILE COPY

FILED
AUG 25 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-328

UNITED STATES OF AMERICA,
Respondent,

versus

WILLIAM O. PARTEN and LEWIS LYNN WHITMIRE,
Petitioners.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

LEE A. CHAGRA
Attorney for Petitioners
616 E. San Antonio
El Paso, Texas 79901

JOSEPH A. CALAMIA
Of Counsel
Suite 1604
State National Bank Building
El Paso, Texas 79901

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions Involved	3
Statutes Involved	3
Statement of Facts	4
Reasons for Granting the Writ	5
Conclusion	8
Appendix A - Opinion Below	1a
Appendix B - Denial of Court Below to Petitioners Petition for Rehearing and Petition for Rehearing En Banc	6a
Appendix C - Judgment	7a

AUTHORITIES

Cases:

Bryson vs. United States, (1969) 396 U.S. 64, 24 L.Ed.2d 264; 96 S.Ct. 365	5
Friedman vs. United States, (CA 8th Cir. 1967) 374 F.2d 361, 1 ALR Fed. 348	5, 8
Carroll Vocational Institute et al. vs. United States, (CA 5th Cir. 1954) 211 F.2d 539	6

Constitutional Provisions:

United States Constitution Sixth Amendment	3
Fourteenth Amendment	3

INDEX (Continued)

Page

Statutes:

Federal Statutes
18 U.S.C. §1001 ..... 2, 3, 5, 7, 8

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1972

No.

UNITED STATES OF AMERICA,
Respondent,

versus

WILLIAM O. PARTEN and LEWIS LYNN WHITMIRE,
Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioners, WILLIAM O. PARTEN and LEWIS LYNN WHITMIRE, pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on June 9, 1972.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, as yet unreported, appears Appendix A, infra. pp. 1a. A petition for rehearing and petition for rehearing en banc, which was timely filed in the United States Court of Appeals for the Fifth Circuit, was denied without opinion. The denial ap-

pears at Appendix B pp. ____. The case at bar is an appeal from the United States District Court for the Western District of Texas, San Antonio Division, no opinion was written by the trial court.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on June 9, 1972. A petition for rehearing and rehearing en banc was timely filed. On July 19, 1972, the petition for rehearing was denied by the United States Court of Appeals for the Fifth Circuit. This petition for certiorari was timely filed in compliance with Rule 22(2). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

Petitioners were convicted of knowingly and wilfully signing fictitious names to Customs Form 6059-B in violation of 18 U.S.C. §1001. The conviction raises the following questions:

1. Whether or not the decisions in other United States Courts of Appeal and other decisions in the Fifth Circuit in direct conflict with the decision in the instant case properly set forth the applicable law.

2. Whether or not the government used the general fraud statute in 18 U.S.C. §1001 as a means of enforcing local practice by the United States Customs in San Antonio, Texas, and so as to deprive Petitioners of equal protection under the law. In this respect, Peti-

tioners would show that execution of Customs Form 6059-B under the facts in this case, was not required and could not be compelled under any statute, rule or regulation.

3. Whether or not the indictments returned against Petitioners violated their constitutional rights by failing to advise them of how the actions complained of were matters material to or within the jurisdiction of a government agency.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment 6:

> "In all criminal prosecutions, the accused shall ... be informed of the nature and cause of the accusation."

Constitution of the United States, Amendment 14, §1:

> "... nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTES INVOLVED

18 U.S.C. §1001

> "Whoever, in any matter within the jurisdiction of any department or agency of the

United States knowingly and wilfully . . . makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000.00 or imprisoned not more than five years, or both."

STATEMENT OF FACTS

The facts relevant to the questions presented by this petition are found in the transcript and are briefly summarized as follows:

Petitioners arrived at International Airport, San Antonio, Texas, aboard Mexicana Airlines flight from Mexico and were furnished Customs Form 6059-B. The form itself stated that a person may make an oral declaration if foreign purchases are less than $100.00 per person. However, it was the practice at the San Antonio International Airport to not let anyone through Customs without Form 6059-B filled in and signed, although the Customs Agency had by its own regulations, as printed on the form, provided that Petitioners could not be compelled to execute same. The testimony also showed that the immigration inspector, as a convenience, used the form to determine whether or not incoming passengers were eligible to enter the United States. But for the immigration authorities use of the form, customs would normally have cleared all incoming passengers including Petitioners without signing. As an investigative procedure, the government commonly ran names through a computer system as a first line of defense against narcotics, but all persons

coming through immigration and customs were not subjected to such treatment.

In addition, the testimony showed that upon inspecting the Petitioners' baggage, traces of marijuana and marijuana seeds were found; Petitioners were searched and upon admitting their true identities, the Assistant United States Attorney was called for authorization to prosecute, whereupon Petitioners were filed on under the provisions of 18 U.S.C. §1001.

REASONS FOR GRANTING THE WRIT

1. The decision below directly conflicts with other decisions in the Fifth Circuit and other federal jurisdictions relative to the interpretation of the phrase "matter within the jurisdiction of any department or agency" contained in 18 U.S.C. §1001.

The question here presented has not yet been determined or clarified by this Honorable Court. In *Bryson vs. United States* (1969) 396 U.S. 64, 24 L.Ed.2d 264, 96 S.Ct. 365, cited by the Appellate Court in its decision, it was held that inquiries made under a statute, later declared unconstitutional, were within the jurisdiction of the agency making the inquiry. Justice Harlan in writing the Bryson opinion and by way of footnote reference to *Friedman vs. United States* (CA 8th Cir. 1967) 374 F.2d 361, specifically stated that the proposition set in the Friedman decision was neither overruled nor approved. The *Friedman* case in holding that a prosecution under §1001 was not authorized for false and fraudulent statements wilfully and knowingly giv-

en to the F.B.I., is in direct conflict with the decision in the instant case. Here customs had no power or right to require execution of Customs Form 6059-B but nevertheless forced such signatures as a courtesy to immigration, and as an investigative procedure only. Though the giving of false information might have caused inconvenience or delay, it could not have perverted customs functions as envisioned by the statute.

Justice Dyer, therefore, in writing the opinion below reads into the statute a broader definition of jurisdiction than the Friedman case allows or than *Carroll Vocational Institute et al. vs. United States* CA 2th Cir. 1954) 211 F.2d 539 from his own Fifth Circuit contemplates.

2. The decision below fails to recognize the distinction between the conditions which require execution of Customs For 6059-B, pursuant to valid statutes and other regulations pertaining to Customs; and the local practice in San Antonio, Texas, of forcing persons declaring less than $100.00 in purchases to sign the form as a courtesy to the Immigration Service, so as to deprive them of equal protection of the law.

Petitioners do not question that United States Customs may set rules and regulations for their own benefit and to enable them to uphold and enforce the law. However, Petitioners do contend that the Customs officials in San Antonio had no jurisdiction to enforce a local practice specifically contrary to its own regulations and requirements, solely as an interagency courtesy to immigration in identifying incoming pas-

sengers. There is no dispute on the record in this case that Customs would not have let anyone through on Form 6059-B without his signature and without a stamp being placed on it by immigration, even though that person had orally declared less than $100.00 in Mexican purchases. Thus as a class, all persons coming into the country from Mexico and arriving at San Antonio International Airport, including these Petitioners, were denied equal protection under the law. Furthermore, it was only after Customs in San Antonio had checked with Customs in El Paso that Petitioners were detained or questioned; an embarassment not accorded to the general run of passengers and they were in effect forced to sign a form not required by statute or regulation; and were subsequently subjected to prosecution under 18 U.S.C. §1001 as a means of Customs enforcing the courtesy extended to the Immigration Officials.

Therefore, it is important to grant certiorari to determine whether or not such courtesy as extended from one government agency to another can have such binding jurisdictional effect under 18 U.S.C. §1001 as to permit a conviction under the indictment in this cause.

3. In the decision below, the court without discussing the points raised, determined that the indictments were sufficient to advise Petitioners in what manner their actions were material to matters within the jurisdiction of Customs in enforcing the laws of the United States.

The decision in this case is in direct conflict with *Friedman vs. United States* (CA 8th Cir. 1967) 374 F.2d 361, 1 ALR Fed. 348, holding that an indictment did not state a violation of 18 U.S.C. §1001 when it charged giving false information to the F.B.I. relative to a violation of the criminal law, the court distinguishing between authority to investigate and the power to compel the action or finally dispose of the problem giving rise to the inquiry. Judge Dyer in writing for the Fifth Circuit found that WHITMIRE and PARTEN were on notice of the charges they must defend without discussing the matter of jurisdiction.

It is, therefore, important to grant certiorari to determine whether or not investigative procedures, not supported by statute or administrative regulation, by agencies of the government other than the F.B.I., fall within the jurisdictional provisions of 18 U.S.C. §1001 so as to render an indictment framed thereunder proper.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully Submitted,

LEE A. CHAGRA
Attorney for Petitioners
616 E. San Antonio
El Paso, Texas 79901

LEE A. CHAGRA

JOSEPH A. CALAMIA
Of Counsel
Suite 1604
State National Bank Building
El Paso, Texas 79901

JOSEPH A. CALAMIA

CERTIFICATE

I certify that on this ____ day of August, 1972, I served a true and correct copy of the foregoing Petition for Writ of Certiorari on Mr. Wayne Speck, Assistant United States Attorney, by mailing him a copy by Air Mail Postage Prepaid, to his office, Federal Courthouse Building, San Antonio, Texas, and another copy on the Solicitor General, by mailing him a copy Air Mail Postage Prepaid, Department of Justice, Washington, D.C.

LEE A. CHAGRA

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-3201
Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

WILLIAM O. PARTEN and LEWIS LYNN WHITMIRE,
Defendants-Appellants.

Appeal from the United States District Court for the Western District of Texas

---

(June 9, 1972)

Before BELL, DYER and CLARK,
Circuit Judges.

DYER, Circuit Judge: This is an appeal from a judgment entered upon a jury conviction of each de-

---

*Rule 18, 5 Cir.; See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir. 1970, 431 F2d 409, Part I

fendant for knowingly and willfully making and using a false writing and document in violation of 18 U.S.C.A. § 1001. We affirm.

The defendants arrived at San Antonio, Texas, aboard a flight from Mexico. Parten used the name William Owen, and Whitmire used the name John David Sharrard on their respective Customs Declarations and both responded in the affirmative when asked if the names used were theirs. The fictitious names were used by the defendants on their airlines passenger tickets and notarized affidavits of residency. Parten had a Florida driver's license in the name of Owens, and Whitmire had an identification card, Social Security card and a pawn ticket in the name of Sharrard.

At the time of their arrest the defendants were on probation from a six months' suspended sentence entered upon a misdemeanor conviction in the State of Utah, involving 130 pounds of marihuana. Parten realized that if he went through Customs in San Antonio he would avoid Customs in El Paso where the inspectors knew him.

The defendants first contend that the Government's evidence failed to show that their actions were within the purview of 18 U.S.C.A. § 1001. They argue that Customs had no right or power to require defendants to execute form 6059-B absent a purchase in Mexico of over $100.00 of merchandise. Furthermore, they allege that the form was used as a convenience in identifying people and this was not material to Customs. We disagree.

It is abundantly clear that the intent of the defendants was to deceive the Customs Service at the border. The defendants did not claim any privilege against placing their names on the Customs declaration forms. They voluntarily did so. But this is no defense to a violation of § 1001. *Poonian v. United States*, 9 Cir. 1961, 294 F.2d 74. Moreover, their reliance upon the premise which they construct, that Customs should not have inquired of their names, ergo, their false statements were made with impunity, is unfounded for "it cannot be thought that as a general principle of our law a citizen has a privilege to answer fraudulently a question that the Government should not have asked. Our legal system provides methods for challenging the Government's right to ask questions — lying is not one of them. A citizen may decline to answer the question, or answer it honestly, but he cannot with impunity knowingly and willfully answer with a falsehood." *Byron v. United States*, 1969, 396 U.S. 64, 72.

We are equally unimpressed with defendants' argument that the declaration was a mere convenience. While U.S. Customs Form 6059-B (signed by the defendants) states on its face that a person may make an oral declaration if foreign purchases were less than $100, every passenger is, nevertheless, asked to sign the declaration not only as a duty form but also for the purpose of identifying the incoming passenger. Customs uses the form as a first line defense to keep contraband and narcotics from entering the United States by identifying suspected or wanted individuals. Since it is impossible to thoroughly search everyone, Customs maintains a wanted list and utilizes a com-

puter system to identify possible suspects. In this case, the computer gave a negative response when the fictitious names of the defendants were fed into it.

The defendants next contend that their conduct, however willfull, that is, done deliberately and with knowledge, was not material and, since materiality is an essential element of the offense charged, *Roland v. United States*, 5 Cir. 1953, 200 F.2d 678, they could not be found guilty. They argue that but for the marihuana found in their luggage it was probable that their true names, had they been known by Customs, would not have been put through the computer. We are unwilling to decide the case on this conjectural possibility. The fact is that the computer was used after the true names of the defendants were learned from interrogation, following the discovery of marihuana, and a "hit" was made on Parten's name. The fact that on this basis alone the defendants would not have been arrested on the spot is of little importance. What may further have been developed by Customs with such knowledge evidences the materiality of the falsifications of defendants' names submitted to Customs.

The defendants raise in this Court for the first time a challenge to the validity of the indictments on the ground they fail to allege facts showing in what manner defendants' actions were material to Customs in enforcing the laws of the United States. Suffice it to say that the indictments are sufficient to place the defendants on notice of the charges which they must defend and to plead jeopardy after their conviction should they again be charged with the same or similar offense.

See United States v. Bearden, 5 Cir. 1970, 422 F.2d 805, *cert. denied* 400 U.S. 826; *James v. United States*, 5 Cir. 1939, 416 F.2d 467, *cert. denied* 397 U.S. 907.

Finally, it is asserted that it was error for the district court to admit evidence of a prior conviction of both defendants for the possession of 135 pounds of marihuana. Pointing out that "willfull," in the statute under which they were prosecuted, means no more than that the forbidden act must be done deliberately and with knowledge but does not require evil intent, *McBride v. United States*, 5 Cir. 1955, 225 F.2d 249, defendants argue that the convictions could not be introduced as bearing on their intent or motives. We disagree. The prior conviction clearly was admissible to prove the defendants' motive in presenting the false identity and to prove that it was done deliberately and with knowledge. *United States v. Dryden*, 5 Cir. 1970, 423 F.2d 1175.

The other issues raised by the defendants are devoid of merit.

AFFIRMED.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-3201

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

WILLIAM O. PARTEN and LEWIS LYNN WHITMIRE,
Defendants-Appellants.

Appeal from the United States District Court for the Western District of Texas

---

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC
(Opinion June 9, 1972, 5 Cir., 1972, ____ F.2d ____).

(July 19, 1972)

Before BELL, DYER and CLARK,
Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regu-

lar active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

APPENDIX C

Filed: Jul. 28, 1972

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1971

No. 71-3201
Summary Calendar

D. C. Docket No. SA71CR117, SA71CR118
UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

WILLIAM O. PARTEN and LEWIS LYNN WHITMIRE,
Defendants-Appellants.

Appeal from the United States District Court for the Western District of Texas

---

Before BELL, DYER and CLARK,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

June 9, 1972

Issued as Mandate: Jul. 27, 1972

A true copy
Test:
EDWARD W. WADSWORTH
Clerk, U. S. Court of
Appeals, Fifth Circuit
/s/ CLARE F. SACHE
Deputy
New Orleans, Louisiana
Jul. 27, 1972

A true copy of the original, I certify.
(SEAL)
DAN W. BENEDIOT, Clerk
/s/ AVADALUPE E. MARTINEZ
Deputy.